

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District <u>Massachusetts</u>
Name <u>Frederic Lepper</u>	Prisoner No. <u>D 1467032</u>	Case No. <u>98-00342</u>
Place of Confinement <u>Souza-Baranowski Correctional Center, Shirley, Massachusetts</u>		
Name of Petitioner (include name under which convicted) <u>Frederic Lepper</u>		Name of Respondent (authorized person having custody of petitioner) <u>v. Lois Russo, Superintendent SBCC</u>
The Attorney General of the State of: <u>Massachusetts</u>		
PETITION		
1. Name and location of court which entered the judgment of conviction under attack <u>Worcester County Superior Court, 2 Main Street, Worcester, MA 01608</u>		
2. Date of judgment of conviction <u>September 15, 1999</u>		
3. Length of sentence <u>10 to 15 years</u>		
4. Nature of offense involved (all counts) <u>larceny over \$250 (23 counts), home contractor fraud (four counts), common and notorious thief</u>		
5. What was your plea? (Check one)		
(a) Not guilty <input checked="" type="checkbox"/>		
(b) Guilty <input type="checkbox"/>		
(c) Nolo contendere <input type="checkbox"/>		
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: <u>Not applicable</u>		
6. If you pleaded not guilty, what kind of trial did you have? (Check one)		
(a) Jury <input checked="" type="checkbox"/>		
(b) Judge only <input type="checkbox"/>		
7. Did you testify at the trial? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		
8. Did you appeal from the judgment of conviction? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		

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9. If you did appeal, answer the following:

- (a) Name of court Massachusetts Appeals Court
- (b) Result Judgement Affirmed.
- (c) Date of result and citation, if known November 19, 2003 60 Mass. App. Ct. 36 (2003)
- (d) Grounds raised Appendi violation, violations of the right to counsel, sufficiency of the evidence, prosecutorial misconduct, jurisdictional error, errors in jury instructions
- (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
- (1) Name of court Massachusetts Supreme Judicial Court
- (2) Result Application for Further Appellate Review Denied.
- (3) Date of result and citation, if known January 29, 2004 441 Mass. 1101 (2004)
- (4) Grounds raised _____
- (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:
- (1) Name of court Not Applicable
- (2) Result _____
- (3) Date of result and citation, if known _____
- (4) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of court Worcester County Superior Court
- (2) Nature of proceeding Motion for New Trial
- (3) Grounds raised Appendi violation, violations of the right to counsel, jurisdictional error, sufficiency of the evidence, prosecutorial misconduct, jury instruction errors

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- (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result Motion for New Trial Denied

(6) Date of result April 1, 2002

- (b) As to any second petition, application or motion give the same information:

(1) Name of court Not Applicable

(2) Nature of proceeding _____

(3) Grounds raised _____

- (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

- (c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☐ No ☐ Not applicable

- (d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

Not applicable.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: The prosecutor's closing argument violated the defendant's right to a fair trial.

Supporting FACTS (state briefly without citing cases or law) The prosecutor's closing argument violated the defendant's federal rights to a fair trial by inflaming the jurors with pleas to sympathy, by improperly attacking Lepper's character, by misstating the evidence, by substantively arguing that the jurors could infer guilt from the number of allegations against him, and by arguing that the defendant operated under a burden at trial.

B. Ground two: Denial of request for substitute counsel and ultimately the denial of effective assistance of counsel.

Supporting FACTS (state briefly without citing cases or law): The judge denied four separate requests for a change of counsel based on breakdown in communication and lack of preparation. At trial, defense counsel failed to object to the prosecutor's closing argument, failed to introduce exculpatory evidence, failed to marshal existing evidence into a format the jury could understand, failed to move to strike extraneous testimony, failed to object to erroneous instructions, and requested that the defendant be adjudicated a common or notorious thief.

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C. Ground three: Conviction obtained in violation of right to have all facts which may increase the statutory maximum included in the indictment and found by the ~~jury~~ jury.
 Supporting FACTS (state briefly without citing cases or law): The defendant was convicted of larceny, which carries a five year maximum sentence. At sentencing the judge made a factual finding that the larcenies were distinct, adjudicated him a common and notorious thief, and sentenced ~~to~~ him to ten to fifteen years.

D. Ground four Conviction obtained in violation of the defendant's right to have the prosecution prove his guilt where the evidence was insufficient as a matter of law to support many of the counts.
 Supporting FACTS (state briefly without citing cases or law): There was insufficient evidence presented on many counts to justify or support the jurors finding of guilt. These counts are grouped as follows: 1) where Lepper made no false statements, 2) where there was no evidence that the burns at issue were adjacent to a home and therefore covered by the home contractor laws, 3) where an entire transaction took place outside of Massachusetts, 4) where the defendant's expenses exceeded the deposit received, 5) the indictment relating to ~~same~~ same.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

Not Applicable.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
 Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Peter L. Ettenberg, Gould & Ettenberg, 370 Main Street, Suite 1050, Worcester, MA 01608.

(b) At arraignment and plea Peter L. Ettenberg, (address as above)

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(c) At trial Michael McEvilly, McEvilly & Curley, 48 West Street,
Leominster, MA 01453,

(d) At sentencing Michael McEvilly (address as above)

(e) On appeal Alan D. Campbell, PO Box 131, Brookline, MA 02446

(f) In any post-conviction proceeding Alan D. Campbell (address as above)

(g) On appeal from any adverse ruling in a post-conviction proceeding Alan D. Campbell
(address as above)

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

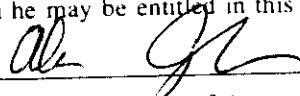
(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

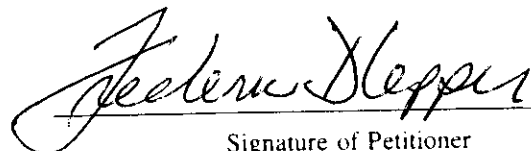
Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.



Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

August 23, 2004
 (date)



Signature of Petitioner